STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS DOEZEMA,

Plaintiff-Appellant,

v

BAY HARBOR YACHT DOCKS and BAY HARBOR CO, LLC,

Defendants-Appellees.

UNPUBLISHED
November 21, 2006

No. 267681
Emmet Circuit Court
LC No. 05-008569-NO

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

FORT HOOD, J. (*dissenting*).

I respectfully dissent.

When reviewing a motion for summary disposition, we consider the evidence presented in the light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001).

To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that includes cause in fact and legal or proximate cause; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Duty is any obligation owed by the defendant to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The application of the open and obvious doctrine is contingent upon the theory of liability at issue. A defendant may rely on the open and obvious doctrine in response to a premises liability claim for failure to warn. *Laier v Kitchen*, 266 Mich App 482, 489, 502; 702 NW2d 199 (2005) (Neff, J., Hoekstra, J., concurring in part). The general rule is that a duty is owed to an invitee by the premises possessor to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to open and obvious conditions on the land that the invitee should have discovered and realized its danger. *Id*. If the risk of harm remains unreasonable despite the apparent obviousness or knowledge, then the invitee may be required to undertake reasonable precautions. *Id*. at 516-517.

However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions

to preclude harm to invitees from the risk. *Id*. at 517. The critical question becomes "whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id*. at 517-518. Special aspects of an open and obvious condition may impose an unreasonably high risk of severe harm. By way of example, an unguarded thirty-foot deep pit in the middle of a parking lot might be deemed an open and obvious condition for which one could conceivably avoid the danger. However, this pit would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonable to maintain the condition without undertaking precautions such as providing a warning or taking other remedial measures. *Id*. at 518-519.

In the present case, plaintiff testified that he was captaining a boat for a family, which was docked at defendants' establishment. At the time of the fall, plaintiff was hosing the soap from a boat that was being washed. Plaintiff testified that a pumpout was not occurring at the time of the fall, and the hose had not been connected to the fitting on the dock. He recalled that a pumpout was occurring halfway down the dock. Plaintiff acknowledged that he was walking backwards at the time of his fall, and the hatch was behind him at the time of the fall. He denied the allegation that he was merely focused on spraying the boat with the hose at the time of the fall. Rather, plaintiff testified that each time he changed positions while walking backwards up the ramp, he would look down to see where he was going to ensure that he was on steady footing. He would target a specific area on the boat. When he needed to address a new spot on the boat, he would reroute the hose, if necessary, and look behind to see where he was standing to adjust for his incremental moves in position. Plaintiff testified that he did not see the hatch open and opined that the hatch was opened seconds before he stepped into the pit. It was estimated that the hatch opening was approximately fourteen inches by forty inches with a fifteen-foot drop to the water. However, beneath the hatch opening, the area was partially blocked on one side by pipes.

Under the circumstances, plaintiff testified that he was aware of the presence of the conditions on the dock. However, at the time of his observation, he was taking precautions to address a *closed* hatch. His predominant concern was maintaining steady footing on the dock and preventing excessive slack in the hose. Viewing the evidence in the light most favorable to plaintiff, *DeBrow*, *supra*, there was no indication that a pumpout near plaintiff was about to occur. Despite the fact that there were other dockworkers present in the near vicinity of plaintiff, dockworkers did not alert plaintiff or others to the opening of the hatch. While a large fluorescent pipe would have been attached to the open pipe under the hatch for the pumpout, it was not attached at the time of the fall. Consequently, plaintiff did not merely trip on the pipe or the cart, but partially fell into the hatch opening and struck his head. Review of the photographs of the open hatch reveal that the pipe opening that served as an attachment for the pumpout was only a few inches in diameter. Despite the fact that hatch opening was significant in comparison to the pipe used in the pumpout, the dock did not have a procedure and practice for opening the hatch. That is, orange safety cones were not placed around the area to prevent someone from falling in the open hatch. Additionally, there could have been fencing or a grid placed around the pipe opening to prevent someone from falling through when the hatch was opened.

As set forth in *Lugo, supra*, the critical inquiry is whether evidence creates a genuine issue of material fact regarding whether there are truly special aspects of the open and obvious condition that differentiate the risk from typical open and obvious risks that result in the creation of an unreasonable risk of harm. Viewing the evidence in the light most favorable to the plaintiff, *DeBrow, supra*, the nature of the hatch and the photographs create a genuine issue of material fact. Plaintiff was aware of the presence of the hatch on the dock. However, he testified that he believed his predominant risk was maintaining footing on the dock in relationship to the operation of the hose. He did not anticipate that the *nature of the hatch* would change without warning. That is, he allegedly was not alerted to the fact that hatch was opened. There were no cones or other safety precautions put into place to alert plaintiff to the change in condition. Similar to the example of the thirty-foot pit in a parking lot, the open hatch caused plaintiff to partially fall through the hatch and strike his knee and his head. Although there is piping in the hatch opening, a person of a smaller stature could conceivably fall through the hole and suffer serious harm. Based on these circumstances, I would hold that a genuine issue of material fact existed that precluded summary disposition in favor of defendants.

/s/ Karen M. Fort Hood